



REPUBLIC OF KENYA



**Republic v Kangethe (Criminal Appeal 76 of 2018)  
[2023] KEHC 1030 (KLR) (Crim) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1030 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL 76 OF 2018  
DO OGEMBO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**GEORGE JAMES KANGETHE ..... RESPONDENT**

*(Being an appeal arising from the Judgment of the Hon. Teresia Murigi, chief magistrate, in Milimani chief Magistrate's Criminal Case No. 744 of 2014 on 5.10.2017)*

**JUDGMENT**

1. The appellant herein, the Republic has herein appealed against the Judgment of the Honourable Chief Magistrate (Hon. Teresiah Murigi), acquitting the Respondent of all charges in Milimani Criminal Case No. 744/2014. In the said case, the Respondent faced the following charges:-

Count Conspiracy to commit a felony contrary to section 393 of the *Penal Code*. that on diverse I: dated between 1<sup>st</sup> April and 11<sup>th</sup> December 2008, at Dagoretti, Riruta in Nairobi, jointly with others before court, he conspired together to defraud Elizabeth Muthoni of her property No. Dagorreti/Riruta/2290.

Count Forgery contrary to section 349 of the Penal Code. that on 4.4.2008 at Nairobi City, with II: others not before court, he forged a signature of a court order dated 4.4.2008 purporting it to be a genuine signature of the Deputy Registrar, High Court of Kenya Nairobi.

Count Malicious damage of property contrary to section 339(2) of the *Penal Code*. That on III: 11.12.2008, at Dagoretti (Riruta in Nairobi City with others not before court, they unlawfully and willfully destroyed 39 wooden houses valued at 5,445,000/= the property of Elizabeth Muthoni.



Count IV: Forcible detainer contrary to section 91 of the *Penal code*. That on 11.12.2008 at Dagoretti/Riruta in Nairobi City, jointly with others not before the court, being in possession of property No. Dagoretti/Riruta 2290 of John Karanja Warui, without colour of right held possession of such land in a manner likely to cause a breach of the peace against John Karanja Warui who was entitled by law to the possession of the said land.

Count V: Making a document without authority contrary to section 357 of the *Penal Code*. That on 4.4.2008 at Nairobi City with to defraud without lawful authority made a document, namely, a court order dated 4.4.2008 purporting it to be a genuine court order issued by the Hon. Justice Kubo of the High Court, Nairobi.

Count VI: Uttering a false document contrary to section 353 of the *penal code*. that on diverse dates between 25.6.2008 and 8.10.2008 at Ministry of Lands offices in Nairobi, jointly with others not before court, knowingly and fraudulently uttered a false document namely, a court order dated 4.4.2008 to the Land Registrar at the lands office, Nairobi.

2. The case before the trial court proceeded to full hearing. And in the judgment of the learned trial magistrate read out in court on 5.10.2017, the accused was acquitted of all the charges. Aggrieved of this finding, the appellant/state has filed this appeal. A total of 7 grounds of appeal have been listed herein as follows:-

1. That the trial magistrate erred in law by finding that the prosecution had not proved its case beyond any reasonable doubt against the Respondent when indeed it had done so.
2. That the trial magistrate erred in law by failing to analyse the evidence of all the prosecution witnesses before arriving at the decision that there was insufficient evidence tendered by the prosecution in support of the charges.
3. That the learned trial magistrate erred in law by finding that the prosecution did not prove conspiracy to defraud by not demonstrating the existence of an agreement between 1<sup>st</sup> accused and others when in fact the prosecution proved through PW8 that 1<sup>st</sup> accused person appeared before him, together with the alleged seller of the land to execute a sale agreement for the land parcel Dagoretti/Riruta/2290.
4. That the trial magistrate erred in law by finding that the prosecution had failed to prove the element of forcible detainer since the 1<sup>st</sup> accused had a right to the property despite the fact that the prosecution had tendered evidence before the court demonstrating that the property was transferred through forged documents.
5. That the trial magistrate erred in law by selectively associating herself to the decision in ELC No. 415/90 to the effect that the 1<sup>st</sup> accused is an innocent purchaser for value despite intentionally not considering the fact that the ruling also locked out the complainant on a technicality for not having applied for letters of administration before instituting the suit.
6. That the trial magistrate erred in law by finding that the 1<sup>st</sup> accused was the legal owner of the land despite the prosecution providing evidence that the alleged agreement for sale between the fictitious Vincent Mbugua and the Late Elizabeth Muthoni was executed by the deceased 5 years after her demise.
7. That the trial magistrate erred in law by finding that the prosecution failed to prove by the offence of malicious damage to property when in fact the 1<sup>st</sup> accused was present during the



demolition of the structures therein and immediately after the demolition went ahead and developed the said land parcel.

3. It has been pleaded herein by the appellant, that this appeal be allowed and that a retrial be ordered. The Respondent has on the other hand, urged that this appeal be dismissed.
4. The parties herein agreed to canvass this appeal by way of written submissions. They have both accordingly complied.
5. From the appellant's side, it was submitted that the first issue for determination is whether the respondent conspired with others to defraud the subject matter. Counsel relied on [\*Archibald's Criminal Pleadings, evidence and practice\*](#), that:

"the offence of conspiracy cannot exist without an agreement, consent or a combination of 2 or more persons."
6. That PW1 John Karanja Warui, the son of the late Elizabeth Muthoni, the owner of the land testified that his mother died on 2.8.2003, having purchased the land in 1963. And that according to PW6, one Vincent Mungai Mbugua transferred the parcel of land on 11.8.2008, while the Respondent became registered owner on 8.10.2008. That this showed that respondent had conspired with Vincent Mungai Mbugua to defraud PW1 of his late mother's land. PW8, Francis Mbugua Kinyanjui, an advocate confirmed witnessing the sale agreement (Exh. 15). And that another advocate, PW9, Tim Ajuana Aliko, also confirmed that Vincent Mbugua transferred the subject property vide ELC No. 47/2008, whose file has never been found. Thus conspiracy to defraud was proved.
7. The 2<sup>nd</sup> issue from the appellant's side is whether or not the appellant forged a court order. That section 349 of the [\*Penal code\*](#) defines forgery as:

" the making of a false document with intent to defraud or to deceive."
8. That the subject land was transferred pursuant to a court order to Vincent Mungai Mbugua to PW6 on 11.7.2008. That on search done on the case, the court file was never found, but that it was established that the suit had been compromised and the subject property transferred to Vincent Mungai Mbugua in 2008, whereas, according to Exh. 1, the deceased had died in 2003.
9. Next was whether or not the offence of forcible detainer was proved. On this, counsel relied on [\*Albert Ouma Matiya Versus Republic\*](#) (Busia) HCCR. Appeal No. 8 of 2013, quoted in [\*Samuel Abuya Mbija Versus Republic\*](#) (2014) eKLR, that:

"The prosecution must establish that the accused was in actual possession of the parcel of land which he had no right of and that the accused person must be in occupation of the parcel of land in a manner that is likely or causes reasonable apprehension that there will be breach of peace against the person entitled by law to the possession of the land."
10. That PW1 had the legal right to the land as a beneficiary of his late mother. That PW5 confirmed that the identification used by one Vincent Mbugua to transfer the land to the respondent was fake, being on 8.10.2008, this was years after the deceased had passed on.
11. On the 5<sup>th</sup> ground of appeal, it was submitted that the court failed to consider that the ELC No. 415/2009 was dismissed only on a technicality for want of letters of administration.
12. Lastly, it was submitted that the prosecution discharged its burden and proved all counts against the respondent.



13. From the Respondent's side, it was submitted that the Hon. Trial magistrate was right on the appreciation of the offence of conspiracy to defraud that the court weighed the evidence of PW1, PW9, PW8, PW11 and PW7 and reached the correct findings that the said Vincent Mungai Mbugua was a creation of the respondent, not that the respondent colluded with the said Vincent Mungai Mbugua to defraud Elizabeth Muthoni of her property.
14. On the dates of the death of Elizabeth Muthoni and the ownership of Vincent Mungai Mbugua, it was submitted that the said Vincent acquired ownership through a court process duly signed by the Deputy Registrar of the court. That the said Vincent Mungai Mbugua had a national identity card, and appeared before, the Land Control Board and also PW8 the advocate.
15. On whether the respondent forged the court order, counsel submitted that the ingredients of forgery are:-
  - a. That the document must be forged
  - b. That the accused used the document as genuine.
  - c. That the accused knew or had reason to believe that it was a forged document.
  - d. That the accused used it fraudulently or dishonestly knowing or having reason to believe that it was a fraudulent.
16. That there was no evidence to suggest that the accused used the order, that the order was forged, that he used it frequently, that he knew that same to be forged, nor that the alleged suit was a sham, neither that he had a hand in the same suit. That the trial magistrate reached the correct findings on these issues.
17. On the issue of forcible detainer, it was stressed that ownership changed from Elizabeth Muthoni to Vincent Mbugua via a court order, and then to the Respondent. That the ELC Judge had already held that the Respondent was the lawful owner, and not the complainant (PW1) whose case was dismissed. That this shows that the threshold for forcible detainer was not met.
18. It was further submitted that the trial magistrate had correctly found that the Respondent was the rightful owner in the circumstances.
19. Lastly, on the prayer for retrial, it was submitted that the trial was meticulously conducted and final judgment rendered, and there is no valid reason to interfere with the Judgment. He relied on [\*PHN Versus Republic\*](#) (2016)eKLR, Court of Appeal Cr. Appeal No. 2 of 2015, where it was held:

"Generally, where a retrial should be ordered or not must depend on the circumstances of the case – it will only be made where the interest of Justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having lapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution make or not."
20. That a retrial should only be ordered on the following principles ([\*PHN Versus Republic\*](#)) above;-
  - i. A retrial may be ordered only when the original trial was illegal or defective.
  - ii. Order of retrial should be made depending on the facts and circumstances of each case, and only to be made where the interest of justice require and where it is not likely to cause an injustice to an accused person.



- iii. Not to be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence, a conviction might result.
21. It was submitted that an order of retrial would be an abuse of the process of the court and amount to double jeopardy. It was urged that this appeal be dismissed.
22. I have considered the submissions of both learned counsel for the parties. From the onset, it must be clear that this court is seized of this matters as a first appellate court. The jurisdiction of this court is therefore well settled from the decision of *Okeno Versus Republic* (1972) EA 32 that it is to reconsider and to re-evaluate the evidence adduced before the trial court, in light of the submissions made in the appeal, and reach its own independent determination whether or not to uphold the conviction of the appellant having regard to the fact that it neither saw nor heard the witnesses.
23. It is therefore the duty of this court to wholly consider such evidence as was presented before the trial court. I have considered the proceedings of the lower court, which were basically as follows:-
24. PW1, John Karanja Warui, a son to the late Elizabeth Muthoni, testified that his mother died on 2.8.2003 aged 89 years. That he resided with his mother in Dagoretti/Riruta/2290 which she had bought from one Ndua Thiong'o in 1963. That the accuseds (appellant) are their neighbor on Dagoretti/Riruta/2290. That on 11.12.2008, while in company of police officers, the Respondent appeared. He was told that his house had been bought. In the presence of an auctioneer, all their houses were demolished and their belongings were placed in a pick-up. They were rendered homeless. It was not much later on 2.6.2009 that the complainant took out a limited grant to enable him file a civil suit against the respondent.
25. This witness was categorical that the Respondent is a stranger in their land. He also denied any knowledge of one Vincent Mungai George who had allegedly transferred the land to the Respondent. He stated that he still had the title deed of the land still in his mother's name. In cross examination he stated that the transaction between Vincent Mbugua and the respondent was fraudulent and that ID No. xxxx used does not belong to Vincent Mbugua, but to Daniel Ngata Kariuki of Othaya, Nyeri. That the High Court had found that Vincent and Respondent acted together in committing a fraud. And that it is the Respondent in occupation of the same, but that the ELC file number 47/2008 has disappeared without trace. He denied that his mother ever sold the land to anyone as he still has the title to the same in her name. The ELC case number 47/2008, filed on 27.2.2008 was filed long after the death of his mother.
26. The wife of the complainant, Lucy Wanjiku Karanja, was PW2. Her evidence was same as PW1 on how their homestead was demolished, and later developed. And PW3, George Githinji Waruo, gave evidence that he witnessed the demolition on 11.12.2008, at the premises of his grandmother Elizabeth Muthoni (deceased). He denied that she had sold the land.
27. PW4, Daniel Ngatia Kariuki, whose evidence was that he resides in Nyeri, and had never owned any property in Nairobi. That the police showed him an ID card with number similar to his ID card numbers xxxx, but with the name Muchemi, from Mathira, while he is from Othaya.
28. And Evans Manga Ayori, PW5, a finger prints officer with the registration of Persons, Nairobi, gave evidence to the effect that the investigator had given him ID card No. xxxx in the name of Vincent Mungai Ngugi, and requested to know whether the same was processed by their department. He confirmed the ID No. xxxx was issued to Daniel Ngatia Kariuki, and that the one shown to him by the police (MFI – 31) was fake and not issued by the department. That the serial number on it 20021xxxx was of Emma Adhiambo Obura of ID No. 6666xxxx.



29. PW6, Benard Kipkemoi Leitich, District Lands Registrar, Thika (formerly at Nairobi registry), gave the history of the land parcel on the register. That Ndua Thiongi transferred same to Elizabeth Muthoni on 3.6.1985. On 26.6.2008, a further transfer to Vincent Mungai Mbugua, and another transfer to George James Kangethe on 8.10.2008, at an indicated consideration of Ksh.3.5 million. There was an initial charge of 320,000/= discharge on 7.7.1993. It was charged for Ksh.12,000,000/= with DTB on 15.11.2009, and a further Ksh.3 million on 3.8.2010. He confirmed that for this transaction, they did not get the original title deed. That the transactions were effected following a court order, and a gazette notice of loss of title deed. There was also no identity card of Vincent Mingai Mbugua printed on the green card.
30. PW7, Joseph Orangi Gitande, a retired Court Executive Officer, High Court Nairobi, recalled that on inquiry being made, file No. ELC 47/2008 could not be found. While giving the details of work at the Registry, he denied that in 2008, Gichohi (Gichobi) was a Deputy Registrar. Also that though the order came from the registry, the number that the case was given was not registered, meaning that the case was not registered.
31. An advocate, Francis Mbugua Kinyanjui, was PW8. His evidence was that he had drafted a sale agreement on 30.8.2008, which the vendor and purchaser executed (Exh 15), and which he stamped. He confirmed that the Respondent was the purchaser. He however did not witness money changing hands. And PW9, Tom Agujana Liko, also an advocate, testified that he acted for the complainant (PW1) as administrator of estate of Elizabeth Muthoni (deceased). He confirmed that his efforts at tracing ELC No. 47/2008 in which Vincent Mbugua had obtained orders, were fruitless. Also that on the cause list of 12.3.2008, the case had been listed No. 12 before the Hon. Justice Kubo, but with different parties, i.e John Mwangi Ngugi Versus Elizabeth Muthoni and not Vincent Mbugua Versus Elizabeth Muthoni. And that in the court diary, the file was marked as compromised and the deceased ordered to transfer the land.
32. This witness also gave his legal opinion that a case cannot be filed in the name of the deceased 5 years after her death. And that the transfer of the land was done before the expiry of 30 days contained in the gazette notice. And that even the names of counsel who appeared before Justice Kubo are not indicated on the court order in ELC No. 47/08. Further that advocate Ngigi Peter Gitau had been struck off the Roll of Advocates, a search revealed (Exh. 25D). Also that the cause list of 28.10.2008, before Hon. R. M. Kimingi, SPM on applications at No. 13 showed Civil Case No. 6167/08, Vincent Mungai Mbugua (Ngigi Gitau & Company Advocates) Versus Joseph Karanja Warui the complainant. That the complainant was then evicted under the court order by an auctioneer, Stephen Kamau Kavuu t/a Wariyo Merchant Auctioneers, together with Vincent Mbugua and the appellant.
33. Patricia Gichohi, Chief Magistrate was PW9. She recalled that from August 2010, she was Deputy Registrar at Milimani. She confirmed that the signature on the order (Exh-17) shown to her on 8.4.2013 was not hers. And that whereas the order says she issued it on 4.4.2008, she was then at Kitale as Principal Magistrate, not Nairobi. And C.I Alex Mwongera, PW10, a document examiner, produced the document examiners' report (Exh-40), confirming that the signature on the court order (Exh-7) and the specimen signature of PW9(Exh.-40) were not made of the same hand.
34. The last witness (CI Abdullahi Shulia PW11), was the investigating officer. He gave a recap of the evidence given by the other witnesses.
35. Upon being placed on his defence, the Respondent gave an unsworn statement. His testimony was that all the allegations against him are false. That he followed all the procedures and is the current owner of the properties. He denied demolishing any property belonging to anyone. He called no witness.



36. I have considered the evidence as presented before the trial court. I have also considered the submissions filed herein by the 2 sides. In determining the issues raised in this appeal, it is important to note the salient areas in the prosecution's case, and which have not been denied by the Respondent's side (accused in the lower court) which clearly point to acts of conspiracies and forgery.
- i. That Elizabeth Muthoni (deceased) the mother of PW1 John Karanja Warui was the original registered owner of land title No. Dagoretti/Riruta/2290 having bought the same from one Ndua Thiong'o in 1963. That the family of the deceased were in physical occupation of the land and also developed the same. Their occupation of the same only came to an end when they were evicted on 11.12.2008.
  - ii. The fact that the family of the deceased owned and never at any one time sell the land is confirmed by the fact that even at the time of their eviction from the land, PW1 still had the original title deed of the land which was still in the name of his deceased mother.
  - iii. That the said parcel of land neighbours the land of the father of the respondent being Dagoretti/Riruta/2289.
  - iv. That Vincent Mungai George, the one who allegedly bought the said land before selling the same to the Respondent was a total stranger to PW1 and his family.
  - v. That the transaction involving the said Vincent Mungai was fraudulent. The identity card No. xxxx used did not belong to Vincent, but rather, Daniel Ngatia Kariuki (PW4) of Othaya, Nyeri. The serial number 20021xxxx on the said identity card on the other hand, belonged to an identity card issued to the holder of ID card No. xxxx, Emma Adhiambo Obura, not Vincent Mungai. This was the evidence of PW5, Evans Mangaa Ayori. The ID according to him was fake.
  - vi. That the ELC court file No. 47 of 2008 which bestowed ownership of the said land to Vincent Mungai disappeared without trace or can simply not be traced at the court registry (PW7). The said case number on the court order was also not registered. The Hon. Patricia Gichohi (PW9) indicated to have signed the same as Deputy registrar, did not sign the same. The said case, filed (allegedly) on 27.2.2008 was filed long after the death of the deceased.
  - vii. That Daniel Ngatia Kariuki, the holder of the number of the identity card used (PW4) has never owned any property in Nairobi.
  - viii. According to PW6, Benard Kipkemoi Leitich, the Lands Registrar, the transactions on the land were done on the basis of a court order. No original title deed was submitted. There was however, a gazette notice of loss of title deed, with identity card of Vincent Mungai Mbugua printed on the green card.
  - ix. According to PW9, Advocate Tom Ajujana Liko, ELC No. 47/2008 was listed before the Hon. Justice Kubo at No. 12, but the parties indicated on the cause were different i.e John Mwangi Ngugi Versus Elizabeth Muthoni and not Vincent Mbugua Versus Elizabeth Muthoni. The said case was filed in the name of the deceased 5 years after her death. The transfer of the land was also done before the expiry of the 30 days contained in the Gazette notice. The name of the counsel appearing before the Hon. Justice Kubo is not indicated. The advocate Ngigi Peter Gitau had also long been struck out of the Roll of Advocates.
  - x. That the eviction took place as a result of the proceedings before the Hon. Kimingi, SPM, wherein the said Ngigi Gitau advocate, already struck out, appeared for Vincent Mungai Mbugua.



37. All these circumstances put together leave no doubt on the fact that there was a well-orchestrated and elaborated plan aimed at depriving PW1 and his family the right and use of their family land left behind by their deceased mother. The one common name that keeps coming up in all this trial is Vincent Mungai Mbugua. He allegedly bought the land from the deceased. He obtained and used a forged identity card. He allegedly presented himself before the Honourable Justice Kubo in ELC No. 47/2008, a file that cannot be traced. He secured the Gazette notice. He allegedly presented himself to PW8 Advocate Francis Mbugua Kinyanjui as the seller of the land. He allegedly signed the sale agreement though the advocate did not witness any money exchange hands between him and the buyers, the Respondent herein.
38. Vincent Mungai Mbugua has never been traced or identified. This court is convinced that he does not exist. The name Vincent Mungai Mbugua was used by the tortfeasor who obtained the fraudulent identity card in that name to enable him execute the plan of fraudulent registration of the complainant's land into his own name and later allegedly "sell" the same to the Respondent herein.
39. The issue for determination by the trial court was whether the Respondent herein conspired or was guilty of the conspiracy to defraud the deceased and her family (the complainant) of her property. The learned trial magistrate answered this is the negative. First, on grounds that the property was transferred to Vincent vide a court order and the Respondent was not party to those proceedings. Also, that there was no evidence of an agreement between the conspirator and the respondent with intention to defraud.
40. The trial court ought to have gone further to consider all relevant circumstances of the case, this being a case of conspiracy, and therefore one which by its very nature discreet. In deciding the possible participation of the Respondent in this conspiracy, the court ought to have considered the very important fact that the only beneficiary of this fraud is the respondent. The respondent maintains that he bought the land from Vincent. There is no evidence of that sale. There is no proof of payment of any purchase price, a fact confirmed by PW8, Advocate Francis Mbugua Kinyanjui, who made the agreement but did not witness any money exchange hands between the parties. The Respondent is an immediate neighbor to the family of the complainant, with their property being adjacent to each other. Yet, through these transactions, there is no evidence that the Respondent did any due diligence by seeking to know from the complainant whether they had actually sold to Vincent their land. One would reasonably be expected to make such basic inquiry from a neighbour.
41. Further, the genuineness of the Respondent's claim also comes to serious doubts by the speed at which he registered the title in his name even before the expiry of the 30 days' notice as captured in the Gazette notice. He is in occupation having developed the land.
42. Had the trial magistrate considered the above factors, it would probably have reached a different finding as I hereby do. That the Respondent before court was actively involved in the conspiracy to defraud and indeed defrauded the complainant and his family of their property being Dagoretti/Riruta/2290.
43. Regarding Count II of forgery contrary 349 of the *Penal Code*, I have noted that there was no evidence tendered by the prosecution to show that it is the Respondent who forged the signature of the Deputy Registrar on the court order dated 4.4.2008. The Respondent's own signature or specimen of the same were never examined for comparison with the questioned signature. The learned trial magistrate was therefore correct in finding that Count II was never proved beyond any reasonable doubt as required by the law.
44. On Count III of malicious damage of property contrary to section 339(2)(a) of the *penal code*, this court has already determined that the respondent engaged in the conspiracy as charged on Count





I. And the undisputed evidence of PW1 John Karanja Warui and PW2 Lucy Wanjiku Karanja was that the respondent was present and supervised the demolition of the property of the family of the complainant. The respondent has admitted the fact of the demolition, only claiming that he was now the rightful owner of the land, title to which he had acquired fraudulently as already found above. Even PW3 George Githinji witnessed the demolition done in the presence of the respondent. The Respondent, being an active participant in the malicious damage of the property must surely be found guilty in count III. I so find.

45. For the same reasons, I find the respondent guilty on Count IV, a charge of forcible detainer contrary to section 91 of the penal code.
46. For Count V, a charge of making a document without authority contrary to section 357(a) of the [penal code](#), i.e the court order dated 4.4.2008, no evidence was laid by the prosecution to prove beyond any doubt that the Respondent made the said document. I therefore agree with the finding of acquittal by the learned trial magistrate on this count.
47. Lastly, regarding Count VI, of uttering a false document contrary to section 353 of the penal code, i.e fraudulently uttering a false document, namely the court order dated 4.4.2008 to the Land Registrar at the lands office, Nairobi, again no evidence was tendered by the prosecution to show who exactly uttered the said false court order to the Land Registrar. I therefore confirm the verdict of acquittal as determined by the learned trial magistrate.
48. Let me now turn to the issue of the ruling of the Hon. Justice A. Mbogholi Msagha (as he then was) of 4.3.2010, in High Court ELC No. 415 of 2009. First, I must admit that this court lacks the legal authority or jurisdiction to reconsider and or challenge the same as it is of a court of concurrent jurisdiction. To that extent I shall refrain from considering the same. Suffice it to say that the said ruling and finding was made at an interlocutory stage on the basis of an application for injunction. For the purpose of this case, it has not been indicated to court whether the main suit therein has since been concluded.
49. The other issue that must be considered is the nature of the orders that this court can issue herein. In the petition of appeal filed herein and dated 2.5.2018, the appellant has prayed that this appeal be allowed and that this court do order a retrial of the case. The respondent has challenged this on grounds that the prosecution has not proved any grounds as to warrant an issue of an order of retrial.
50. The case cited by counsel for the Respondent of [PHN Versus Republic](#) (2016)eKLR, gives the general directions as to when an order of retrial may issue, as;

.... The principles an appellate court may apply in determining whether to order a retrial are as follows:-

- i. A retrial may be ordered only when the original trial was illegal or defective.
- ii. Whether an order for retrial should be made depends on the particular facts and circumstances of each case but should only be made where the interest of justice require it and where it is not likely to cause an injustice to an accused person.
- iii. A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence, a conviction might result.



51. I have considered the circumstances of this case and I am convinced that an order of retrial would not be in the interest of justice in this matter. I decline to issue the same.
52. As to the orders that this court may issue in the circumstances, I get guidance from the provisions in the [criminal procedure code](#). Section 354(3)(c) dealing with power of the court of appeal directs;
53. In an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of hearing or otherwise, with such direction as the High Court may think necessary and make such order in relation to the matter, including an order as to costs, as the High Court may think fit.”
54. The above provision gives this court the power to determine this matter even to the extent of reversing the determination of the trial court. I have carefully weighed the circumstances of this case, including the time this case has taken (ie from 2014), the observations that this court has made in this Judgment and the possibility of the fact that the learned trial magistrate may not be available any more to try this case again, and I am convinced that it would be proper and in utmost interest of justice for this court to itself make a final determination of this matter as opposed to referring the same back to the subordinate court. I so find.
55. I accordingly therefore find and determine as follows:-
  - i. Count I – The finding of the trial magistrate is reversed. The Respondent is convicted of the offence of conspiracy to commit a felony contrary to section 393 of the [penal code](#), under section 215 of the [Criminal Procedure Code](#).
  - ii. Count II – The finding of acquittal by the trial court is confirmed.
  - iii. Count III – The finding of the trial magistrate is reversed. The Respondent is convicted of the offence of malicious damage to property contrary to section 339(2)(a) of the [Penal Code](#).
  - iv. Count IV – The finding of the trial magistrate is reversed. The respondent is convicted of the offence of forcible detainer contrary to section 91 of the [penal code](#).
  - v. count V – The finding of acquittal of the trial magistrate is confirmed.
  - vi. Count VI – The finding of acquittal of the trial magistrate is confirmed.

**HON. D. O. OGEMBO**

**JUDGE**

**16<sup>TH</sup> FEBRUARY, 2023**

**COURT:**

Judgment read out in court in open court in presence of Mr. Siagi for the respondent and Mr. Mutuma, counsel for the state.

**HON. D. O. OGEMBO**

**JUDGE**

**16<sup>TH</sup> FEBRUARY, 2023**

Ms. Siagi:



I pray for Monday to take instructions on when Respondent may be present for mitigation and sentence.

Mutuma:

We pray for extension of the warrant of arrest.

Court:

Warrant of arrest to remain in force. Case fixed for mention for directions on mitigation and sentence. Mention 20.2.2023.

